United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4138

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Statue:

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that Local 814 violated Section 8(b)(1)(A) and (2) of the Act by attempting to apply a collective bargaining agreement, including union security provisions, to employees at the Company's White Plains facility who had not designated Local 814 as their bargaining representative.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, *et seq.*), for enforcement of its order against Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "Local 814"). The Board's Decision and Order (A. 103-104)[1] was issued on March 31, 1976, and is reported at 223 NLRB No. 71. This Court has jurisdiction, the unfair labor practices having occurred in New York, where Morgan and Brother-Manhattan Storage Co., Inc. (herein "the Company") is engaged in the moving and storage business.

I. THE BOARD'S FINDINGS OF FACT

The Board found that Local 814 violated Section 8(b)(1)(A) and (2) of the Act by attempting to apply its collective bargaining agreement with the Company to employees at a recently acquired facility in White Plains, which was not an accretion to the contract unit, when Local 814 did not represent a majority in the White Plains unit. The facts underlying this finding are largely undisputed (A. 93; 2-4, 5) and are set forth below:

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[1] "A." references are to the pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. Background

Prior to 1974, the Company had eight moving and storage facilities. Five of them are in Manhattan — one record storage facility, two moving and storage facilities, and two storage warehouses. In Westchester County, the Company has one facility in Armonk, which handles long-distance moves and exports, and one moving and storage facility in Rye. In Greenwich, Connecticut the Company maintains one moving and storage facility with emphasis on exports. (A. 95, 96; 14-16, 20, 70.)

The Company's employees at these facilities are represented by three unions, in three separate units. The employees at the five Manhattan facilities and 6 people at the Armonk facility are covered by collective bargaining agreement with Local 814. Another Teamster Local, Local 191, represents the Company's Greenwich employees and 19 people at the Armonk facility. Teamster Local 445 represents the employees at the Rye facility (A. 95, 96; 14, 16-17, 70.) Each of the three bargaining units comprises chauffeurs, packers, helpers, warehousemen, and checkers (A. 96; 18).

In June 1974, the Company purchased a moving and storage facility in White Plains from J.H. Evans & Sons Inc. ("Evans"). At the time of purchase Evans' employees were represented by Local 445. The Company acquired Evans' building, trucks, equipment, name, and storage accounts and retained the Evans' employees and dispatcher. (A. 93; 19-20, 68.) Except for repainting Evans' trucks with its own colors and assigning a former Company employee as manager, the Company has made few changes in the operation of the White Plains facility (A. 93; 19-21, 68).

B. Local 814 claims that the White Plains facility is covered by its contract

Local 814's contract with the Company contains a union security clause requiring employees to become or remain members of Local 814 on or after 31 days of employment and provides that the contract shall cover "any other moving and storage business within the jurisdiction of Local 814 or Local 445" thereafter acquired by the Company (A. 94; 85). On June 7, shortly after the Company purchased the White Plains facility from Evans, Local 814 notified the Company that "Local 814, I.B.T. considers the former Evans employees to be part of our bargaining unit and covered by our collective bargaining agreement" (A. 94; 77). When the Company received this letter on June 11, it also received a letter from Local 445 asserting its intention to continue representing the White Plains employees (A. 94; 78). The Company responded by suggesting to both Local 814 and Local 445 that "resolution of the dispute [would be] best done between the two locals and the employees involved" (A. 94, 79).

Pursuant to the provisions of the Teamsters' international constitution, Local 445 requested that the dispute over the representation of employees at the White Plains facility be considered by the Executive Board of Teamsters Joint Council 16. On September 6, that council determined that the White Plains facility was within the jurisdiction of Local 814. (A. 94; 80, 86-89, 82, 42-43.) A week later Local 814 asked the Company to comply with the council's determination, and on October 16 the Company signed a memorandum extending Local 814's contract to the White Plains employees, effective October 1 (A. 94; 81, 83).

About October 17, two Local 814 business agents told the White Plains employees that they would have to join Local 814 and warned that, if they failed to join, Local 814 would replace them with its own members. By letter dated October 25, the president of Local 814 notified these employees that their continued employment depended upon joining Local 814 no later than 31 days after receiving the letter, and that, if they failed to do so, Local 814 would request that the Company discharge them. (A. 94; 4, 5.)

Thereafter, Local 814 complained to the Moving & Storage Joint Labor Management Board ("Joint Board") that the Company was not applying its contract to the White Plains facility (A. 94; 90-91). The Joint Board, composed of an equal number of employer and union representatives, issued a decision on December 5, after a hearing at which the Company and Local 814 presented their views. The Joint Board found that the Company's contract with Local 814 required it to treat the former Evans employees as an accretion to Local 814's unit.[2] (A. 94-95; 90-91, 51-52.)

C. The White Plains facility constitutes a separate appropriate unit and is not an accretion to the Local 814 unit.

The White Plains facility is 2 or 3 miles from the Armonk facility, 7 to 9 miles from the Rye facility, 11 miles from the Greenwhich facility, and 16 to 17 miles from the Manhattan facilities (A. 95; 25). The employees at the White Plains facility perform essentially the same tasks as

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[2] The Joint Board relied on paragraph 51A of the Local 814 contract, which is set forth at A. 85.

their counterparts at the Company's other facilities (A. 96; 25-26). The Company's contracts with the three local provide for similar conditions; therefore all the Company's employees work the same hours and shifts (A. 96; 69, 26).

The White Plains employees are separately supervised by a dispatcher and a branch manager located at that facility. The branch manager is responsible for the daily operations and sales, and contacts the central headquarters only if he needs help (A. 96; 31-32, 68, 70-71). The White Plains employees receive their assignments from the dispatcher, who determines the size of the work force needed each day and either lays off employees or draws more men from a seniority list. If the seniority list of employees at the facility is exhausted, the dispatcher may hire additional employees. The dispatcher reports to the branch manager, who answers directly to headquarters. (A. 97; 31-34, 57, 74.)

The Company's Manhattan headquarters handles all billing, collections, accounting, purchasing, and advertising (A. 95; 28, 66, 73). Although the headquarters prepares all payrolls and stores payroll information, each facility prepares its own payroll records (A. 95-96; 28, 65). The Company's president, E.P. Sadler Morgan, directs labor relations for the whole company, negotiates all collective bargaining agreements, and has final authority over discharges, suspensions, long-term layoffs, and discipline (A. 96; 32, 57-58, 69). However, grievances are first presented to the branch manager, and only those that cannot be resolved by the branch manager are presented to the president (A. 96; 33). The Company's headquarters assigns work to the facility nearest the move's point of origin (A. 96; 59, 67). Trucks delivering loads from New York City to the suburbs may pick up

helpers at a suburban facility, and the same is true for moves in the opposite direction (A. 96; 58-60, 35). The White Plains facility supplies an average of 11 man-days of work per week to the other Westchester County facilities; in turn they provide an average of two man-days each week to White Plains (A. 96; 23-25, 34-35).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the White Plains facility constituted a separate appropriate bargaining unit and was not an accretion to the unit represented by Local 814. Accordingly, the Board found that Local 814 violated Section 8(b)(1)(A) and (2) of the Act by attempting to apply its collective bargaining agreement, including the union security clause, to the White Plains employees at a time when Local 814 did not represent a majority of these employees. (A. 103, 93, 99.)

The Board's order requires Local 814 to cease and desist from the unfair labor practices found and from restraining or coercing the Company's White Plains employees in any like or related manner. Affirmatively, the order requires Local 814 to reimburse, with interest, all present and former employees of the Company's White Plains facility, except those who joined Local 814 before execution of the October 16 agreement between the Company and Local 814, for all initiation fees, dues, and other money paid by them pursuant to the contract. The order also directs Local 814 to post the customary notices. (A. 100-102.)

ARGUMENT

THE BOARD PROPERLY FOUND THAT LOCAL 814 VIOLATED SECTION 8(b)(1)(A) AND (2) BY ATTEMPTING TO EXTEND THE COVERAGE OF ITS CONTRACT WITH THE COMPANY TO THE EMPLOYEES AT THE WHITE PLAINS TERMINAL

A. Introduction

The National Labor Relations Act confers on employees the right to bargain collectively through representatives of their own choosing, in a unit appropriate for such a purpose. It is well settled that a union violates the Act when it attempts to apply a collective bargaining agreement, which accords it exclusive recognition as the employees' statutory bargaining representative, to employees who have not selected the union as their bargaining representative. See *International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. N.L.R.B.*, 366 U.S. 731 737-739 (1961); *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1005-1006 (C.A. 2, 1973). Such conduct violates Section 8(b)(1)(A), as it infringes on the right of employees freely to select, or to refrain from selecting, a majority representative. If the contract contains a union-security clause, a union also violates Section 8(b)(2) of the Act by requiring the employees to become members as a condition of employment. *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F.2d 35, 36 (C.A. 2, 1961); *N.L.R.B. v. Revere Metal Art Co.*, 280 F.2d 96, 100 (C.A. 2, 1960), cert. denied, 364 U.S. 894; *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1354-1356 (C.A. 9, 1970); *Local 620, Allied Industrial Workers v. N.L.R.B.*, 375 F.2d 707, 710-711 (C.A. 6, 1967).

Here it is undisputed that Local 814 and the Company agreed to apply their collective bargaining agreement to the White Plains employees, without determining whether these employees wanted to be represented by Local 814, and that Local 814's business agents attempted to enforce the union-security clause of this contract (A. 97; 2-4, 5). Accordingly, Local 814 violated Section 8(b)(1)(A) and (2) of the Act.

Before the Board, Local 814 sought to avoid the conclusion that it acted unlawfully in imposing its contract upon the White Plains employees by arguing that this new facility was merely an accretion to its existing bargaining unit.

As we show below, the Board properly rejected this defense and concluded that, since the White Plains facility could constitute a separate appropriate bargaining unit, it was not an accretion.

B. The Board properly concluded that the White Plains employees were not an accretion to Local 814's bargaining unit

The statute accords broad discretion to the Board to determine the scope of appropriate units for collective bargaining. As this Court has stated,

> Section 9(b) of the Act places in the hands of the Board the responsibility for making such unit determinations, which, in view of the large measure of informed discretion involved, are to be disturbed only if arbitrary and unreasonable. *Packard Motor Car Co. v. National Labor Relations Board,* 330 U.S. 485 * * * (1947); *N.L.R.B. v. St. John's*

Associates, Inc., 392 F.2d 182 (2 Cir. 1968); *N.L.R.B. v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 624 (2 Cir.), cert. denied, 355 U.S. 818 * * * (1957).

Continental Insurance Company v. N.L.R.B., 409 F.2d 727, 730 (C.A. 2, 1969), cert. denied, 396 U.S. 902. See also *South Prairie Construction Co. v. Local No. 627, Operating Engineers*, ___ U.S. ___, 96 S. Ct. 1842, 1844 (1976). When the Board's unit determination is challenged, the Court's "power of review . . . has been narrowly circumscribed" (*N.L.R.B. v. St. John's Associates, supra*, 392 F.2d at 183), and the party urging reversal "undertakes a sizeable burden." *Wheeler-Van Label Company v. N.L.R.B.*, 408 F.2d 613, 616 (C.A. 2, 1969), cert. denied, 396 U.S. 834.

The burden upon a party asserting that a group of employees has accreted to an established unit is even greater. Unlike ordinary unit determinations, where the "Board's duty is to choose *an* appropriate unit . . . [from] several appropriate ones" (*Wheeler-Van Label Co. v. N.L.R.B., supra*, 408 F.2d at 617), a determination of accretion depends upon a finding that the larger unit is alone appropriate, and that new employees could not constitute a separate appropriate unit. As the Board has stated, it will not, "under the guise of accretion, compel a group of employees, who may constitute a separate appropriate bargaining unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). Recognizing that an accretion finding "denies the new employees the right to express their wishes in an election", this Court

has agreed that such findings should be made with caution. *N.L.R.B. v. Horn & Hardart Co.*, 439 F.2d 674, 682 (C.A. 2, 1971). Accord: *Westinghouse Electric Corp. v. N.L.R.B.*, 440 F.2d 7, 11 (C.A. 2, 1971); cert. denied 404 U.S. 853); *N.L.R.B. v. Masters-Lake Success, supra; Boire v. International Brotherhood of Teamsters (Pilot Freight Co.)* 479 F.2d 778, 795-796 (C.A. 5, 1973); *Sheraton Kauai Corp. v. N.L.R.B., supra,* 429 F.2d at 1355-1356.

In this case, it is clear that the Local 814 has not met its burden of proving that the White Plains facility cannot reasonably be viewed as a separate appropriate bargaining unit. Local 814 points to factors such as centralized control of labor relations and some interchange of employees on a Company-wide basis. While these factors might demonstrate the appropriateness of a larger unit, they are insufficient to overcome the Board's finding that the employees at the White Plains facility may also constitute a separate appropriate bargaining unit. Thus, the White Plains facility is separately supervised, geographically distinct from the Local 814 unit, and has historically been represented as a separate unit. The fact that the White Plains facility has sufficient local autonomy from central control to permit meaningful bargaining at that location cannot be denied. Other facilities within the Company do constitute separate bargaining units, and President Morgan testified that each facility possessed a great degree of local autonomy. He stated (A [illegible]).

> We manage basically by exception, meaning [that] when everything is fine, we don't hear from the manager. If he needs us, he calls us. That is the exception. He is in charge of the sales and whatever has to go on in the particular branch.

In such circumstances, the Board has traditionally held, with court approval, that the single facility is an appropriate bargaining unit. *Alterman Transport Lines, Inc.*, 178 NLRB 122, 126 (1969), 187 NLRB 1037 (1971), enf'd, 465 F.2d 950 (C.A. 5, 1972); *Groendyke Transport, Inc.*, 171 NLRB 997, 998 (1968), 181 NLRB 683 (1970), enf'd, 438 F.2d 981 (C.A. 5, 1971), cert. denied, 404 U.S. 827; *Groendyke Transport, Inc.*, 164 NLRB 231 (1967), enf'd, 417 F.2d 33 (C.A. 10, 1969), cert. denied, 397 U.S. 935; *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 846 (C.A. 9, 1967).

C. The Board properly exercised its discretion in refusing to defer to the Joint Board decision that the White Plains facility was an accretion to Local 814's bargaining unit

Before the Board, Local 814 strenuously argued that the December 5 decision of the Moving and Storage Joint Labor Management Board was a "final and binding arbitration award" to which the Board should defer. This contention lacks merit, and the Board properly rejected it.[3]

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[3] Contrary to Local 814's misconceptions, the Board was not faced with an "intraunion jurisdiction dispute," or required to defer to the Joint Board decision under Section 10(k) of the Act. In a true "jurisdictional dispute," a union tries to force an employer to assign particular work to one of "two or more employee groups claiming the right to perform certain work tasks." *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (Columbia Broadcasting System)*, 364 U.S. 573, 586 (1961). See also Section 8(b)(4)(D) of the Act; *N.L.R.B. v. Plasters' Local Union 79*, 404 U.S. 116, 123, 135 (1971). Here, neither the award of the Joint Board nor the decision of the Labor Board has anything to do with the assignment of work; there is no dispute over the Company's assignment of work to the White Plains employees, and these employees will still be assigned their old work, regardless of the outcome of this litigation. Rather, the controversy is essentially one of representation. See *Crown Cork & Seal Company*, 203 NLRB 171, 172 & n. 7 (1973), and cases

As shown above, Section 9(b) commands the Board to choose an appropriate unit which will "assure to the employees the fullest freedom in exercising the rights guaranteed by [the] Act." In the performance of this statutory duty, the Board refuses to permit private contracts to divest it of its primary role in determining unit boundaries. The "rights of the employees . . . to choose their own bargaining representative cannot be abrogated by [a] contract" between a union and an employer. *Local 620, Allied Industrial Workers v. N.L.R.B.*, 375 F.2d 707, 710 (C.A. 6, 1967). Accord: *Sheraton-Kauai Corp. v. N.L.R.B., supra,* 429 F.2d at 1357, and cases cited therein.

The Board's policy of declining to defer representation issues, such as accretion claims, to the arbitral process has been approved by this Court. *N.L.R.B. v. Horn & Hardart, supra,* 439 F.2d at 678-681. No reasons have been advanced here which would require the Board to depart from this well established policy,[4] or which would compel this Court to withdraw its approval of that policy.

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[3] (continued)
cited; *Westinghouse Electric Corp.*, 162 NLRB 768, 770 (1967). Cf. also *Carey v. Westinghouse,* 375 U.S. 261, 269 (1964). Section 10(k), which requires the Board to accept work assignment awards rendered by procedures binding all the involved parties *(N.L.R.B. v. Plasterers', supra),* has absolutely no role in the instant case. See *McDonnell Company,* 173 NLRB 225 (1968); *Mountain States Telephone and Telegraph Company,* 118 NLRB 1104, 1107 (1957).

[4] See *Germantown Development Co., Inc.*, 207 NLRB 586, 587 (1973); *Combustion Engineering, Inc.*, 195 NLRB 909 (1972); *Peerless Publications, Inc.*, 190 NLRB 658, 659-660 (1971); *Woolwich, Inc.*, 185 NLRB 783, 784 (1970).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's Order in full.[5]

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August, 1976.

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[5] Local 814 also attacked the Board's reimbursement remedy, described above (p. 7), on the ground that it "only proceeded peacefully and in accordance with a valid contract" and has not shown "any proclivity . . . to violate the Act." However, reimbursement of dues and fees is a time-honored remedy when there is direct or circumstantial evidence that the employees have been coerced into joining a union through a union-security clause. See *N.L.R.B. v. Hudson Berlind Corp.*, 494 F.2d 1200, 1202 (C.A. 2, 1974), cert. denied, 419 U.S. 897; *Amalgamated Local Union 355 v. N.L.R.B., supra,* 481 F.2d at 1006; *Sheraton-Kauai Corp. v. N.L.R.B., supra,* 429 F.2d at 1357-58, and cases cited; *Spartans Industries v. N.L.R.B., supra,* 406 F.2d at 1006; *N.L.R.B. v. Revere Metal Art Co., supra,* 280 F.2d at 100-101. In the instant case, the White Plains employees gave no consent to Local 814's unlawful extension of its contract; Local 814's business agents threatened to enforce its union-security clause; and Local 814's president warned these employees that they would be replaced if they did not join that union (A. 94; 4, 5). These facts provide ample evidence that the White Plains employees were coerced.

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 23rd day of August, 1976.